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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 945.

MASSEY-FERGUSON LIMITED, a corporation,
Petitioner,

v.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, *et al.*,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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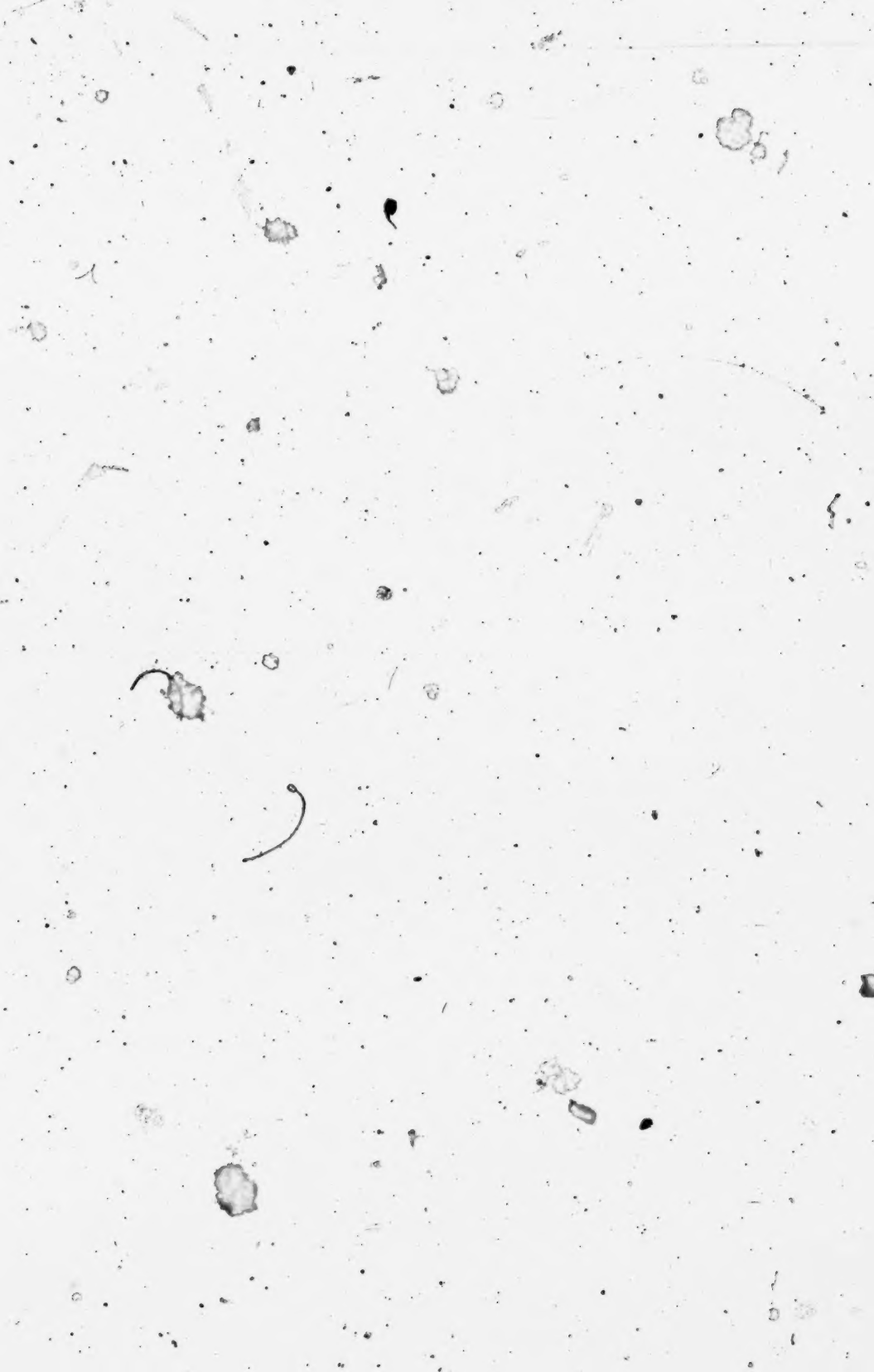

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This reply brief is submitted to correct certain overstatements in respondents' brief in opposition.

Petitioner Has Correctly Stated The Question Presented

The question presented is, as stated in the petition:

> "Where a Canadian corporation transacts no business in the United States, may it be sued and served in a private antitrust suit in the United States solely because it controls and is able to 'direct the detailed activities' of its wholly owned subsidiary which transacts business and is found in the United States, where the subsidiary has also been named as

> a party, has appeared to defend and is capable of responding to any judgment which may be entered?"

There is no issue here, as respondents suggest, of an attempt to "immunize" petitioner from suit by the "mere interposition" of a subsidiary which has been "circumvented and overridden" to "evade the enforcement of our antitrust laws" (Brief in opposition, pp. 2, 10, 12). This suggestion is respondents' invention. Neither the language of the Court of Appeals, as quoted by petitioner, nor the language of the District Court suggests any such attempt at evasion. The decision of the Court of Appeals makes the existence of control over detailed activities of a subsidiary sufficient to make the parent corporation subject to suit and service—without any showing of an attempt to evade the law.

In fact, the record affirmatively shows the absence of any attempt to evade the law by petitioner. Petitioner's subsidiary, Massey-Ferguson Inc., has not contested the jurisdiction of the court. It has appeared to defend the action, and is defending vigorously. Any relief to which plaintiffs could conceivably be held entitled can be obtained from the subsidiary. The subsidiary's assets are more than fifty times the amount of the *ad damnum* alleged. Any injunction against the subsidiary will, under Federal Rule 65(d), be binding upon all persons in active concert or participation with it who receive actual notice of the order by personal service or otherwise.

These practical facts dispose of respondents' principal contention, which is that the Court of Appeals' decision is necessary to carry out a Congressional purpose of relieving "persons injured through corporate violations of the antitrust laws from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places

of their business." *United States* v. *Scophony Corp.*, 333 U. S. 795, 808 (1948). This situation is simply not presented here. Plaintiffs are suing in the forum of their choice,* will obtain redress there if, contrary to defendants' contentions, they are entitled to any, and face no insuperable obstacles in the preparation or presentation of their case. There is no support in either decision below or in the record for any suggestion that plaintiffs have sought to bring petitioner into the litigation only because they have been unable to obtain evidence from the subsidiary by the usual procedures provided in the Federal Rules or from the petitioner by the usual procedures provided in Canadian law.

Plaintiffs have in fact obtained extremely extensive discovery from the subsidiary, including depositions of its executives and examination of its documents. Plaintiffs have already been furnished many thousands of documents, including cost information, operating statements, invoices and many other documents relating to retail store operation. Plaintiffs made no efforts to invoke the Canadian discovery procedures against petitioner, but joined petitioner as a party from the outset of the proceeding, for no apparent purpose other than to obtain discovery without compliance with Canadian procedures. On numerous occasions plaintiffs have stated their keen interest in going to Toronto to examine petitioner's senior officers, who are responsible for coordinating operations of petitioner's affiliates around the world. As the principal issue in the litigation is whether excessive trade-in allowances were given on farm equipment at stores in Burley and Idaho Falls, Idaho, the impor-

* This happens to be the District of Utah, not the District of Idaho, where most of the allegedly unlawful acts took place, where three of the five plaintiffs have their places of business, and where Massey-Ferguson Inc. has a branch office and a number of retail stores.

tance of such examinations to the preparation of plaintiffs' case is questionable, but plaintiffs are free to move for them under Canadian law.

Thus petitioner has correctly stated the question presented. There is no question here of "evasion" of United States law by petitioner. The only question of evasion is that presented by respondents' evident reluctance to invoke Canadian discovery procedure.

The Court of Appeals Did Not Apply *Scophony*.

The chief reason advanced by respondents for denying the writ is that "The Court of Appeals correctly applied the controlling decision of this Court," referring to *United States v. Scophony Corp.*, 333 U. S. 795 (1948). This is not borne out by the Court of Appeals' opinion. The opinion does not cite *Scophony* or any other decision of this Court, although respondents urged before the Court of Appeals, both in opposing grant of permission to appeal and in argument on the merits, that *Scophony* controlled the questions before the Court.

There was ample reason for the Court of Appeals' failure to rely on *Scophony*.

In the first place, *Scophony* did not hold that the parent could be sued because of the degree of control exercised by the parent over the subsidiary. *Scophony* held rather that the parent corporation through its representative was present in the district. 333 U. S. at 810, 816, 818. The Court stated pointedly that Elcock, the person served, "in view of his triple position as mortgagee, corporate officer, and attorney-in-fact, . . . for all relevant purposes at this phase of *Scophony's* activity . . . was the company." 333 U. S. at 816. Thus the question presented in this case—whether the parent comes within the statute because of

control over the subsidiary's activities—was not decided by *Scophony*.

Secondly, the Court of Appeals could not have treated the *Cudahy* doctrine as "rejected" in *Scophony*, as respondents state on page 10 of their brief, because this Court in *Scophony* explicitly "left untouched" the *Cudahy* doctrine, 333 U. S. at 817, 813 n. 23, for use in cases, unlike *Scophony*, involving manufacturing and selling companies. *Scophony* involved a company whose only activity was licensing, and that company was at the time of service engaged, through its own representative and not a subsidiary, in carrying on in the district "largely if not exclusively the only business" it had. 333 U. S. at 810. To construe *Scophony* as overruling *Cudahy* would thus be permitting the decision in an uncommon and virtually unique situation* to control the decision in the much more frequently encountered situation present in *Cudahy*-type cases, contrary to the express statement of the Court.

Thirdly, the Court of Appeals could not have treated *Cudahy* as "rejected" by *Scophony* without placing itself in express disagreement with the multitude of cases, including certain of those cited at pages 9-11 of the petition, which have not treated *Scophony* as overruling *Cudahy*.

In short, the Court of Appeals did not adopt respondents' contention that *Cudahy* was "rejected" in *Scophony*. Instead the Court of Appeals made important new law without explaining the basis for its action. This new law is contrary to that applied in this and other Courts, and will have a significant effect on the course of private antitrust litigation and on relations with foreign countries for many years.

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* Characterized by the Court as "different and distinct", 333 U. S. at 817.

The Question Presented is Important.

Although respondents' brief in opposition denies that the question presented is "worthy of review" (page 5), various statements in the brief underscore the need for review.

Respondents state "businessmen in the United States and abroad need ~~have~~ no doubt as to whether *Cudahy* supplies the determinative tests of venue and service under Section 12 of the Clayton Act—for this Court has told them it does not" (Brief in opposition, p. 9). If this were true, the quandary of the businessmen would be all the greater—for several district courts have subsequently told them that it does. *Terry Carpenter Ltd.* v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Austad* v. *United States Steel Corp.*, 141 F. Supp. 437, 439 (N. D. Cal. 1956); *Lawlor* v. *National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950). All these decisions arise under Section 12 and apply *Cudahy*, referring to *Scophony* on other points.

Respondents state that the decision below will not result in extraordinary expansion of the jurisdiction of the federal courts (Brief in opposition, p. 11). Yet in the very next breath, respondents defend the decision because it makes possible suits which might otherwise be impossible.

Finally, respondents' brief pinpoints the impact of the decision below on international relations. Respondents attempt to explain their reluctance to try to use the applicable foreign procedures because "such procedures may be inadequate" or impossible of utilization (Brief in opposition, p. 12). In this backhanded way, respondents admit that the effect of the decision will be to permit lengthier or more far-reaching examination than would be available from courts at the witnesses' residence. This is precisely the type of activity which, when engaged in by the United States Government, provoked the protests

described at pages 18-19 of the petition herein. Respondents wish, for their private purposes, the power to provoke similar international outcries whenever it suits their strategy to do so. Respondents demand this power without making any effort to obtain discovery from the appropriate foreign courts having jurisdiction or demonstrating that reasonable discovery is unavailable for any reason. Whether Congress intended to place such power in the hands of treble-damage litigants is clearly a question worthy of review by this court. The accommodation of the respective interests of United States and foreign courts is surely as much a concern of this Court as the accommodation of the respective interests of federal and State courts within the United States.

Conclusion

Respondents' brief in opposition suggests that petitioner is attempting to evade the law and that the decision below is merely an application of an earlier decision of this Court. These suggestions are erroneous. No such attempted evasion by petitioner has been intimated by the courts, and it is petitioner, not respondents, which seeks to have the decision of this Court applied to permit businessmen to plan with certainty, and to prevent a substantial expansion of federal jurisdiction and unwarranted interference with the exercise of foreign sovereignty.

Respectfully submitted,

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Dated: April 28, 1964.